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Analysis of market access issues facing developing countries: Impact of anti-dumping and countervailing actions

Note by the UNCTAD secretariat

Addendum

Malaysia requested on 29 January 2001 that its policy comments as contained in the annexed table be taken into consideration in the preparation of the documents for the fifth session of the Commission on Trade in Goods and Services, and Commodities. It also requested that since the anti-dumping investigating authorities in Malaysia lack experience in certain areas, the views expressed herein on some provisions are to be regarded as "evolving".

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POLICY COMMENTS ON THE OUTCOME OF THE EXPERT MEETING ON THE IMPACT OF ANTI-DUMPING AND COUNTERVAILING MEASURES
COUNTRY: MALAYSIA

No.	Views Expressed	Policy Comments
	1. DUMPING	
1	5 % viability test 5. The 5 % test should be applied on a global basis for the like product. The investigating authorities should conduct a further review to determine whether the low domestic sales volume compared to the export volume was caused by the small size of the domestic market of the exporting country and might, therefore, serve as the basis of normal value. The per capita consumption of the product concerned should be taken into account.	If the sales volume is small due to small size of domestic market, the producer/exporter needs to submit the evidence to substantiate the claim for consideration, as the Investigating Authourity (IA) may not have access to such information.
2	Paragraph 6, Page 2: Exclusion of sales below cost 6. It has been suggested that the current 20 % threshold may not adequately reflect business realities. Practice by investigating authorities also seems to suggest that where sales below cost represent more than 20% of total domestic sales, such sales are systematically excluded and normal value is based on remaining sales above cost artificially and arbitrarily increasing normal values and dumping margins. To tackle this problem, the current 20% cut-off could be raised, and authorities must respect the "reasonable period of time" as required by the Anti-Dumping Agreement. 7. It was suggested that the weighted average normal value may not be less than the weighted average cost per unit.	Need further investigative/empirical study.
3	Constructed Normal Value 8. Experience seems to suggest that manipulation of exporters financial information may result in distortion of the dumping margins of exporters under certain circumstances. Article 2.2.2 allows too much discretion and may lead to unreasonable selling, general and administrative expenses and profit calculations in certain cases. Therefore, the current provision should be clarified	Agreeable.
4	Fair and symmetrical comparison: 9. It was generally felt that in order to achieve a fair comparison, common rules must be established to obtain equal results based on the same set of data.	Agreeable to further clarifying common rules.

5	Credit cost 10. Actual credit costs should be accepted in normal value calculations even if not based on contractual arrangements.	Agreeable provided evidence of actual credit cost incurred is shown.
6	Duty drawback 11. High standards of burden of proof are in some jurisdictions used to reject or minimize normal value adjustments based on valid duty drawback claims. Article 2.4 of the AAD should be clarified to ensure that drawback adjustments are based on prevailing business practices and realities.	Agreeable to establishing reasonable standard of proof expected of exporters based on prevailing duty drawback system of the country.
7	Level of trade 12. Some countries define the difference of level of trade in a complicated manner thereby imposing an unreasonable burden of proof on exporters. Also, countries do not provide proper information regarding the definition of level of trade. Rules on identification and quantification of level of trade adjustments are needed.	Agreeable.
8	Exchange rate fluctuations 13. The absence of a definition of: "sustained movement" in Article 2.4.1 is a matter of concern for countries with floating exchange rates. Short-term fluctuations and long-term trends in exchange rates should be clearly distinguished and that the long-term trends should be defined as "sustained movement", which would normally exceed 60 days for adjustment of export prices.	Agreeable to further discussion.
9	Exchange gains or offsets 14. While exchange losses are usually taken into account, exchange gains are frequently ignored on narrow, technical grounds thereby inflating costs and minimizing favourable adjustments. Article 2.2.1.1 should be clarified so as to exclude consideration of both exchange gains and losses, or to ensure that exchange gains are included in the calculation of costs of production.	Agreeable to further discussion.
10	Zeroing (exceptions) 15. The three exceptions contained in Article 2.4.2 (purchasers, regions, time) are too broad and disproportionately benefit large economies. The exceptions must be tightened. Zeroing should not be applied in both investigations and reviews.	Agreeable.

11	Non-market-economy treatment 16. Non-market-economy provisions should only be applied against countries which meet the criteria of GATT Article VI, that is a non-market economy is one which has a "complete or substantially complete monopoly of its trade and all domestic prices are fixed by the state". Very few countries at present meet these criteria. 17. In cases where investigating authorities encounter difficulties in establishing normal value, for example for exports from countries in transition, they should ensure that the methodologies used are in fair and predictable.	Agreeable.
12	*De minimis* dumping 18. The practical impact of an increased de minimis dumping margin should be empirically researched. It was suggested that UNCTAD could undertake a study on this issue.	Agreeable.
13	Cyclical industries 19. Given the fact that some industries are cyclical, the current treatment of sales below costs of production as set out in the AAD can result in the finding of dumping during periods of low capacity utilization. Solutions should be sought to avoid massive imposition of measures during such periods.	Need further investigative/empirical study.
	2. INJURY	
14	Basis of Negligibility 20. It has been suggested that thresholds for excluding negligible imports from injury determinations should be based on share of the importing country market, not of imports.	Agreeable. **Need to also stipulate a standard/fixed time frame in considering the total imports**.
15	Negligible Import Volumes 21. The level of negligible imports should be increased to a level higher than the current 3 % based on empirical research demonstrating a positive trade impact.	Agreeable. Need to carry out empirical study.
16	Cumulation 22. Cumulation of suppliers that individually meet the negligible criteria using the 7 per cent rule, should be revised or eliminated.	Agreeable to reviewing.
17	Captive production/definition of "industry" 23. Exclusion of captive production from injury analysis should not occur without proper justification.	Need further study for consistency in considering captive production as against definition of domestic industry.

18	Lesser duty rules 24. It was suggested that the lesser duty rule should be made mandatory and its application made subject to regular review. It was observed that some authorities had encountered difficulties in calculating the lesser duty.	Needs further study to establish standard methodologies in calculating the lesser duty rule.
19	**3. PROCEDURE** Back-to-back complaints 25. The repeated recourse to AD actions against same product has been identified as one of the problems relating to the implementation of the AAD. The disciplines in this regard should be strengthened to preclude the initiation of any investigation for a period of 365 days from the date of termination of a previous investigation on the same product from the same country. 26. Petitions brought before the investigating authorities within the 365 days should be examined with the utmost care.	Further study needed to establish what would be an appropriate period.
20	Standing 27. When challenging standing, the burden of proof should not be on the exporters, rather the national investigating authorities of the importing country should demonstrate that they have correctly determined standing in accordance with Article 5.4 of the AAD.	Agreeable.
21	Sunset reviews 28. Anti-dumping and countervailing duty actions should not normally continue after five years. An anti-dumping duty should remain to force only as long as and to the extent necessary to counteract dumping which is causing injury. The investigating authorities have been conducting sunset reviews in conformity with the spirit and legal requirements of the WTO Agreements.	Agreeable. Need to establish guidelines and standard criteria for sunset reviews.
22	Questionnaires 29. Replying to questionnaires, some of which extend to hundreds of pages, constitutes a major burden, particularly for small and medium-sized exporters from developing countries. The questionnaires should be as simple as possible, focusing only on the necessary information. Consideration should be given to a standard questionnaire.	Agreeable.

23	Language 30. Difficulties and cost in translating documents required as evidence in investigations should be taken into account by investigating authorities with a view to minimizing the burden on respondents. Translation difficulties should be given special consideration as a justification for extension beyond the normal 30 days for responding to questionnaires	Agreeable to the extension of time but is of the view that this does not resolve other related problems. A country with no resource to translate a particular language is unable to evaluate the basis of the initiation and subsequent findings of the IA to appropriately respond or establish whether the provisions of the WTO AD Agreements have been fully complied with in conducting the investigation. Further, inaccurate translations may give negative legal implications in disputes. Therefore propose translations to be done by the IA in any one of the 3 WTO languages.
24	Independent bodies 31. It was suggested that national AD/CVD administering or investigating authorities should function autonomously with respect to technical decisions.	
25	Price undertaking 32. In order to enable exporters to continue to access to the market, price undertakings should be accepted, if offered by the exporters under terms that would remedy dumping or its injurious effects, as an alternative to anti-dumping duties.	The current flexibility provided by the WTO AD Agreement to be maintained.
26	**4. SPECIAL CONCERNS OF DEVELOPING COUNTRIES** 33. Anti-dumping actions, including the initiation of investigations that are subsequently determined to be unfounded, may often have a devastating effect on the economies and societies of developing countries as they cut off trade to crucial export markets. They often frustrate their efforts to diversify their exports into new sectors of production. Anti-dumping actions may result in a diversion of investment away from developing countries to the major market countries. Anti-circumvention measures could result in countries which have made no contribution to material injury in the importing country being caught up in anti-dumping actions. Developing countries are particularly concerned that upon the expiry of the ATC, there could be a wave of anti-dumping actions against textiles and clothing exports. 34. There is a need to make the best endeavour provisions of Article 15 of the Anti-Dumping Agreement operational. This could be accomplished *inter alia* by increasing the de minimis	Agreeable.

	thresholds for dumping and injury to levels which would provide meaningful trade advantages for developing countries and eliminating cumulation of their exports. Increases of these thresholds to 5% were suggested, but further empirical analysis should be undertaken to ensure that these levels were high enough to accord meaningful trade advantages to developing countries. Higher thresholds would also reduce the cost of defense against anti-dumping actions by developing countries as they would be automatically excluded in a greater number of cases. **The possibility of recommending progressive duties in the case of developing countries should be explored to help the producers in these countries in realigning their production**.	Need further study on the practical aspects of implementation.
27	Cost of defence 35. Developing country exporters face serious difficulties in defending their interests against anti-dumping actions. They usually do not possess the necessary technical expertise, and lack the resources required for legal counsel in anti-dumping actions or in pursuing their rights under the WTO dispute settlement mechanism. These exporters require training in order to understand dumping issues so as to minimize the risk of anti-dumping actions against them	Agreeable.
28	Difficulties in application 36. Developing countries, which are the subject of dumping, face difficulties in applying anti-dumping actions. They lack the financial, technical and human resources to conduct investigations. As a result, many find themselves unable to defend their producers against dumped imports. They require technical and financial assistance to strengthen their administrations. 37. Dumped imports are a particular problem for African countries which perceive that they are the targets of increased dumping from outside the region; they require assistance in addressing this problem. A solution should be sought for African countries.	Agreeable.
29	Small economies 38. Technical assistance should take into consideration the specificities of small developing economies, such as an accentuated lack of financial, technical and human resources, and should provide for a practical approach to institution building that could economize on investigation, administrative and other costs. 39. Given the size of the market and the strength of the local industries, the time taken by local industries to lodge a complaint and for an AD investigation to be initiated, may result in the death of the industry.	

	40. Small economies have few products for export and any AD actions against these products will destabilize the economy.	
30	Countervailing duties 41. In assessing duty drawback systems in developing countries, aggregate evidence should be accepted when exporters are unable to identify individual inputs. Developing countries request that they should be entitled to estimate the incidence of excise, sales and other internal taxes for refund without this being considered an export subsidy. The *de minimis* subsidy level for countervailing duty investigations should be increased from 1 per cent to 2.5 per cent for developing country exports.	Agreeable. Need further investigative/empirical study on the increase of *de minimis* subsidy level for developing countries.